

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STEVEN R. GRAY,)	No. 55903-6-I
)	
Appellant,)	
)	
v.)	
)	
JAMES ROBINSON and JANE DOE)	
ROBINSON, husband and wife,)	UNPUBLISHED OPINION
)	
Respondents.)	FILED: September 18, 2006
)	

ELLINGTON, J. Stephen Gray appeals the verdict in his personal injury suit on several grounds, including improper admission of non-expert evidence of an unrelated medical condition. We agree that admission of this evidence was prejudicial error, and reverse.

BACKGROUND

As he was driving to school on the morning on December 1, 1997, teenager James Robinson, Jr. lost control of his car and skidded into a Jeep Cherokee parked in Stephen Gray's driveway. At the time, Gray was about to leave for work in the panel van he drove for his job as a technician at Puget Sound Energy. The force of the impact pushed the Jeep into the van, and the van skidded toward Gray. Gray

jumped out of the way and landed on a bark pile.

Gray visited an outpatient clinic that day, complaining of aches and pains in his back, shoulder, wrist, and left leg. The majority of his injuries healed within weeks, but Gray continued to experience pain in his left knee. He was eventually diagnosed with chondromalacia, an irregularity in the cartilage behind the kneecap which causes pain, catching, and popping of the knee joint.

Gray sued Robinson, who admitted liability. Trial proceeded on questions of causation and damages. Gray claimed damages for past and future medical expenses, past and future pain and suffering, and future income loss based upon evidence that his knee injury would prevent him from working indefinitely in his job, which requires crouching, kneeling, climbing, and crawling. Over Gray's objection in limine, Robinson introduced, solely through Gray's own testimony, evidence that in October 2000, Gray developed an umbilical hernia after moving his boat while mowing his lawn, and that in 2002, Gray was diagnosed with multiple sclerosis (MS). Neither the MS nor the umbilical hernia was confirmed or explained by medical testimony.

The parties stipulated to reasonable and necessary expenses of \$2,648.07, which the jury was instructed to award if they found Robinson's negligence proximately caused Gray's injury. Using a special verdict form, the jury returned a verdict for Gray, awarding \$2,648.07 in past economic damages, and the same amount in past and future pain and suffering. The jury made no award for future economic damages.

The court denied Gray's motion for a new trial. Gray appeals admission of the evidence about MS and the hernia and denial of his motion for new trial.

DISCUSSION

We review evidentiary rulings for abuse of discretion. Sunbreaker Condominium Ass'n v. Travelers Ins. Co., 79 Wn. App. 368, 372, 901 P.2d 1079 (1995). A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence is generally admissible so long as it is relevant, that is, that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401, 402. However, evidence without adequate foundation is not relevant, because it is not useful in making material facts more or less likely. See 5A Karl B. Tegland, Washington Practice § 611.5 (4th ed. 1999); State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990). Where the subject matter of testimony is beyond the common knowledge and understanding of the average person, expert testimony is appropriate to assist the jury. ER 702; State v. Ciskie, 110 Wn.2d 263, 274, 751 P.2d 1165 (1988). "Medical facts in particular must be proven by expert testimony unless they are 'observable by [a layperson's] senses and describable without medical training.'" Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (quoting Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 533, 627 P.2d 104 (1981)) (alteration in original). Medical expert testimony may not

be speculative; the opinion must be grounded on a reasonable medical certainty.

Reese v. Stroh, 128 Wn.2d 300, 309, 907 P.2d 282 (1995).

Gray moved in limine to exclude any evidence about MS on grounds that the evidence was hearsay, lacked foundation, invited speculation, and was more prejudicial than probative. See Report of Proceedings (RP) (Jan. 10, 2005) at 14–24; RP (Jan. 11, 2005) at 49. He argued that no medical expert had offered an opinion as to whether or when the disease might make him unable to continue in his current job, nor had any expert been identified by the defense. The court denied the motion, ruling that evidence of MS might be relevant if Gray’s vocational counselor had considered the disease in recommending job retraining.

On cross examination of Gray, Robinson asked about his MS. Gray explained that MS’s impact on individual patients is unpredictable, but that to date his symptoms have been successfully suppressed by medication. The court also permitted Robinson to ask Gray about a discussion with his neurologist at the time of his diagnosis regarding vocational issues:

- Q: Mr. Gray, isn’t it true that on March 28th of 2002 you were in to see Dr. Conley and you had a discussion with Dr. Conley about vocational issues related to multiple sclerosis?
- A. He gave me my diagnosis that evening, and I asked him if I would be able to continue to do my job.
- Q. And did he also—and he said that he thought you could do your job, correct?
- A. Yeah, he didn’t know what the effect of drugs and stuff would be. So he didn’t know if it would go in submission, which is what it is, or if it would get progressively worse. Everybody reacts differently to MS.

- Q. And he told you you should have a backup plan and start planning over the next five years with getting into a more sedentary line of work?

- A. He recommended that I might want to be thinking about something because of my age.

RP (Jan. 11, 2005) at 158–59. The neurologist’s written note of the conversation was not introduced, but it was read to the court during argument on the motion in limine. Notably, the record did not state that MS would force Gray to leave his job, nor did it suggest a date by which the doctor expected Gray’s job would have to change. See RP (Jan. 10, 2005) at 14–15.¹ The jury submitted several inquiries, which the court put to Gray, including the date of his diagnosis, his treatment, and whether MS had caused him to miss work (it had not).

Cloie Johnson, a vocational rehabilitation counselor, testified that she and Gray discussed his MS in devising a retraining strategy for his future employment after the accident, although she did not review any medical records relating to MS. The trial court permitted the inquiries about MS as relevant to Gray’s claim for lost future earnings.

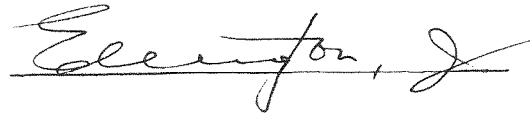
But the manifestations and course of MS are not matters within the purview of the average juror. Absent expert testimony describing the disease, its common trajectory, and a prediction to a reasonable medical certainty of its likely effect on Gray, the jury had no way to evaluate whether the disease would affect Gray’s employment. Once the evidence was introduced, however, the jury had to presume

¹ Conley’s note reads: “We discussed vocational issues[,] specifically that I do not think he needs to change his job, but given his age I think he should look for a backup plan, start planning for over the next five years getting into a more sedentary line of work with the same company. He will do this.” RP (Jan. 10, 2005) at 14–15.

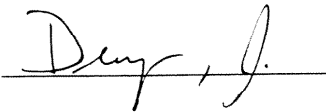
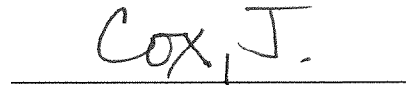
it relevant, and was thus forced to speculate on these questions. This is improper.²

Nor was it harmless. Gray's MS and its future consequences were central to Robinson's defense against Gray's damages case. We cannot know that the improper evidence played no role in the jury's rejection of Gray's lost future income claim. We therefore reverse and remand for a new trial.

Reversed and remanded.

A handwritten signature in cursive script, appearing to read "E. Livingston", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Cox, J.", written over a horizontal line.

² The court also admitted evidence, again sans expert, of Gray's "umbilical hernia" allegedly suffered after the accident as a result of exertion from moving a boat. The trial court opined that umbilical hernias are within the common knowledge of the jury. We doubt the verity of this observation, but given our disposition, we do not address it further.